IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-84,066-01

EX PARTE JUAN BALDERAS

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. 1412826 IN THE 179TH DISTRICT COURT HARRIS COUNTY

***Per curiam*.**

O R D E R

This is an application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.

The victim, Eduardo Hernandez, was a member of the La Tercera Crips ("LTC") street gang in Houston, but had stopped associating with them after he had "snitched" on a fellow gang member to the police. Applicant was also a member of the LTC and was the one who brought Hernandez into the gang. In early December 2005, senior members of the LTC held a meeting where those in attendance agreed that Hernandez needed to be

killed. Although they did not expressly select an individual to kill him, everyone understood that Hernandez was applicant's responsibility because he had introduced Hernandez to the LTC.

On December 6, 2005, at approximately 9:45 p.m., Durjan Decorado was in his apartment with his cousin and friends Karen Bardales, Wendy Bardales, Edgar Ferrufino, and Hernandez. A gunman came into the apartment and fired his gun as he ran around the living room. He eventually stopped, stood over Hernandez, and shot Hernandez in the back and head multiple times. Wendy later identified applicant as the shooter. At the time of his arrest, Applicant was in possession of the murder weapon.

In February 2014, a jury found applicant guilty of the offense of capital murder. At punishment, the jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Balderas v. State*, 517 S.W.3d 756 (Tex. Crim. App. 2016).

Applicant presents fourteen allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial court held an evidentiary hearing, and entered findings of fact and conclusions of law and recommended that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by applicant. The portion of claim 5 in which applicant complains his right to a fair trial was

violated because of an incident in which applicant's brother waved at the jury when their bus passed is procedurally barred because that issue was raised and rejected on direct appeal. *Balderas*, 517 S.W.3d at 782-91; *see also Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006) (holding that claims that have already been raised or rejected are not cognizable). Claim 10 in which applicant complains his equal protection rights were violated by the parties agreeing to strike numerous prospective jurors without questioning them is also procedurally barred because habeas is not a substitute for matters which should have been raised on direct appeal. *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004) (holding that even a constitutional claim is forfeited if the applicant had an opportunity to raise the issue on appeal).

In claims 1 and 2, applicant contends that his due process rights were violated when the State obtained a guilty verdict through the use of false evidence. Specifically, applicant alleges that the testimony of State's witness Israel Diaz was "concocted by the State." The trial court held a hearing and considered affidavits to determine if Diaz was recanting his trial testimony, whether Diaz was pressured by the State pre-trial to change his testimony, and whether Diaz testified falsely under oath. Based upon the record, applicant fails to support his claims with adequate facts as the evidence before us contradicts his allegation that Diaz provided false testimony. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

In claim 3, applicant complains that his due process rights were violated when the

State failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, applicant alleges that the State failed to disclose handwritten notes from the State's pre-trial interviews with Diaz. However, applicant must do more than state mere conclusions of law or allegations of error; applicant must support his claim with adequate facts. *Ex parte Maldonado*, 688 S.W.2d at 116. Applicant fails to do so here and the evidence before us shows that the complained-of notes were contained within the State's file and were reviewed by defense counsel in preparation for trial.

In claims 4, 6, 8, and 9 applicant contends that trial counsel were ineffective for the following reasons: (1) at the guilt/innocence phase: failure to investigate and prepare the defense case, failure to present eye-witness-identification expert testimony, and failure to investigate juror misconduct; (2) at the punishment phase: failure to investigate extraneous offenses, failure to investigate and prepare the mitigation case, failure to object to the trial court's denial of funding to transport witnesses from Mexico, failure to object to the State's questioning and jury argument allegedly attacking applicant's failure to testify, and defense counsels' behavior and alleged alienation of the jury; (3) failure to timely and competently assert applicant's right to a speedy trial; and (4) at jury selection: failure to address the topic of sexual abuse to determine if jurors would find it to be potentially mitigating, and failing to preserve the record regarding the reasons for the parties agreements to excuse a large number of prospective jurors without questioning them. Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668

(1984). He fails to show by a preponderance of the evidence that his counsels' representation fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id.* at 689.

In the remainder of claim 5, applicant alleges that his right to a fair trial was violated because his jury was "exposed to multiple external influences and engaged in rampant misconduct that tainted the verdict." Specifically, applicant complains that the jury was housed at a hotel near the crime scene on their first night of sequestration, and that a juror made several Facebook entries— beginning during jury selection through the end of his service as a juror. Concerning the hotel accommodations, applicant fails to do more than state mere conclusions of law or allegations of error; the evidence before us fails to show by a preponderance of the evidence that applicant was prejudiced or that the results of his trial were affected. *See Ex parte Maldonado*, 688 S.W.2d at 116. Applicant also fails to show that he was prejudiced by the Facebook posts or that he was denied a fair and impartial trial. *See Ocon v. State*, 284 S.W.3d 880, 885 (Tex. Crim. App. 2009)(holding that a defendant is not entitled to a mistrial after defense counsel overheard juror's phone conversation with unknown person because there was not evidence the juror was biased as a result of the improper conversation).

Additionally, in claim 5, applicant alleges that jurors failed to follow the trial court's instructions when they engaged in premature discussion of the evidence and relied upon their own expertise. However, we are unable to consider the merits of applicant's

allegations of juror misconduct concerning deliberations. Texas Rule of Evidence 606(b) prohibits testimony or other evidence regarding "any matter or statement occurring during the jury's deliberations" except that a juror may testify regarding outside influences or to rebut a claim that a juror was not qualified to serve. As this allegation concerns neither an "outside influence" or juror qualifications, the jurors' affidavits on this subject are not properly before the Court.

In claim 7, applicant contends that his due process rights were violated when the State obtained his death sentence through the use of the false or misleading testimony of punishment-phase witness Christopher Pool. However, applicant fails to demonstrate that that Pool's testimony was false and material to the jury's verdict. *See Ex parte Weinstein*, 421 S.W.3d 656, 665-66 (Tex. Crim. App. 2014)(holding applicant must show by a preponderance of the evidence that the testimony was, in fact, false and that the testimony was material—that there was "a reasonable likelihood that the false testimony affected the judgment of the jury."); *see also Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011)(holding that testimony is material if there is a "reasonable likelihood" the false testimony affected the jury's judgment).

In claims 11 through 14, applicant challenges the constitutionality of various aspects of Texas Code of Criminal Procedure Article 37.071: the constitutionality of the "10-12" rule, that the first special issue is unconstitutionally vague, that the punishment phase jury instructions restricted the evidence the jury could determine as mitigating, and

that Texas's capital punishment scheme is arbitrarily imposed. These claims have been repeatedly rejected by this Court and applicant raises nothing new to persuade us to reconsider those holdings. *See Davis v. State*, 313 S.W.3d 317, 354-55 (Tex. Crim. App. 2010)("10-12" rule, arbitrarily imposed capital punishment scheme); *Coble v.State*, 330 S.W.3d 253, 297 (Tex. Crim. App. 2010)(vague first special issue, restriction of evidence that can be considered mitigating).

Based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 18th DAY OF DECEMBER, 2019.

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